U.S. Department
of Transportation
**Research and
Special Programs
Administration**

400 Seventh Street, S.W.
Washington, D.C. 20590

MAY 16 2001

Mr. Wilbur E. McConicko
Interim Director, Department of Public Utilities
City of Richmond, Virginia
600 East Broad Street
Richmond, Virginia 23219

Re: CPF No. 1-2000-0003

H

Dear Mr. McConicko:

Enclosed is the Final Order issued by the Associate Administrator for Pipeline Safety in the above-referenced case. It withdraws one of the allegations of violation, makes one finding of violation and assesses a civil penalty of $5,000. The penalty payment terms are set forth in the Final Order. This case will close upon payment of the civil penalty. Your receipt of the Final Order constitutes service of that document under 49 C.F.R. § 190.5.

Sincerely,

Gwendolyn M. Hill

Gwendolyn M. Hill
Pipeline Compliance Registry
Office of Pipeline Safety

Enclosure

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

DEPARTMENT OF TRANSPORTATION
RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, DC 20590

In the Matter of	)	
	)	
City of Richmond, Virginia,	)	CPF No. 1-2000-0003
	)	
Respondent.	)	
	)	

FINAL ORDER

On February 24, 2000, pursuant to 49 U.S.C. § 60117, a representative of the Office of Pipeline Safety (OPS) conducted an investigation of the February 22, 2000, incident involving Respondent's natural gas distribution system at the intersection of 12th and Main Streets in Richmond, Virginia. As a result of the investigation, the Director, Eastern Region, OPS, issued to Respondent, by letter dated August 31, 2000, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Respondent had committed violations of 49 C.F.R. Part 192 and proposed assessing a civil penalty of $5,000 for each of the alleged violations, for a total penalty of $10,000.

Respondent responded to the Notice by letter dated September 29, 2000 (Response). Respondent contested alleged violation 1 in the Notice, requested mitigation of the proposed civil penalties, and requested a hearing that was held on November 20, 2000. After this hearing, Respondent provided additional information on December 15, 2000.

FINDING OF VIOLATION

At the hearing and in its written responses, Respondent did not contest alleged violation 2 in the Notice. Accordingly, I find that Respondent violated the following section of 49 C.F.R. Part 192, as more fully described in the Notice:

> 49 C.F.R. § 192.725 -- failure to properly pressure test a line that had been disconnected from service before the line was returned to service.

This finding of violation will be considered a prior offense in any subsequent enforcement action taken against Respondent.

WITHDRAWAL OF ALLEGATION

Item 1 in the Notice alleged that Respondent had violated 49 C.F.R. § 192.285 by failing to properly qualify persons to make plastic pipe joints. In its written responses and at the hearing, Respondent presented evidence and arguments for the purpose of contesting Item 1.

Respondent first argued that it cannot be held in violation of § 192.285(a) if it fails to properly requalify individuals, since the requalification requirement is listed under § 192.285(c). This argument fails because subsection (c) contains no independent procedures for requalifying individuals but, rather, states the criteria under which a previously qualified employee must be qualified again using an applicable procedure. The only qualification procedure is contained in subsection (a). Thus, an operator can be found in violation of subsection (a) if it fails to require individuals to make a specimen joint satisfying the subsection (b) criteria before qualifying them to make plastic pipe joints, whether they are being qualified for the first time or requalified under subsection (c).

However, in its written response, Respondent correctly observes that OPS carries the burden of proving that Respondent violated the regulation. OPS can meet this burden in several different ways. For example, where the regulations require that operators keep records of specific required activities, the absence of such records is evidence that the operator has failed to perform those activities. Likewise, where the regulations require that an operator establish written procedures for the performance of certain activities, the lack of such procedures may be used as evidence that the operator has failed to perform the activities. In addition, an OPS investigator's testimony regarding the comments made by an operator's employees during the course of the investigation may be used as evidence of a violation.

Specifically, Item 1 alleged that Respondent failed to require its employees to make a specimen joint pursuant to § 192.285(a) prior to qualifying them to perform the procedure. This section of the regulations requires operators to qualify persons before allowing them to make a plastic pipe joint. It does not require operators to have written procedures or to keep records of who is qualified or how those individuals were qualified.[1]

In its Violation Report, OPS stated that it interviewed Mr. Butch Flippin, a Fusion Trainer for Respondent. According to OPS, Mr. Flippin stated that mechanical joining training is conducted in conjunction with safety training by showing a video tape demonstrating mechanical joining methods but that no hands-on training is provided that would require individuals to make a specimen joint as part of their qualification training.

---

[1] However, new pipeline safety regulations that require operators to establish a written program for qualifying individuals to perform certain tasks and to keep qualification records became effective on October 26, 1999, and are found at 49 C.F.R. §§ 192.801 to 192.809. Under the new regulations, operators are required to establish written procedures for qualifying individuals under Part 192. In addition, the new regulations require that operators maintain records of the names of individuals qualified under the program, the tasks each is qualified to perform, the date of each individual's current qualification and the method under which each was qualified. Although Respondent is not required to establish its written qualification program until April 27, 2001 and cannot be held accountable for a lack of written procedures or records under the new regulations, it should be aware that these regulations will apply to similar situations in the future.

On the other hand, Mr. J.C. Stafford, the Safety Coordinator for Richmond, testified at the hearing that Respondent follows a procedure wherein its field supervisors receive training that involves the making of a specimen joint pursuant to the regulations. According to Mr. Stafford, these field supervisors subsequently supervise Respondent's other employees as they make a specimen joint in the field. Respondent argues that this method properly qualifies all of its employees under the regulations. OPS conceded that this method would meet the current regulatory requirements, if it was followed by the Respondent.

In support of its testimony, Respondent compiled and submitted a 124-page supplemental document on December 15, 2000. Some of the information in this document supports Respondent's claim that it requires supervisors to make specimen joints at training sessions. For example, pages 11, 16, 34, 38, 43 and 52 appear to show Respondent's supervisors making specimen joints during training. In addition, pages 91-97, 102-103, 107-117, 119-120, and 122-123 each contain an individual sworn statement from one of Respondent's crewmen that he or she made a mechanical joint either during a training session or in the field under the direct supervision of an experienced crew chief.

The remaining information does not offer much support to Respondent's argument. For example, pages 80-85, 87-90, 99-101, 104-106, 118, and 121, each contain an individual sworn statement from one of Respondent's supervisors or inspectors that he or she attended training sessions but do not mention making specimen joints. In addition, page 23 contains a copy of a letter dated December 4, 2000 from Mr. Jeffrey Cox, Perfection Corporation, to Mr. Stafford. In his letter, Mr. Cox notes that Perfection personnel have performed three training sessions for Respondent in the past three years, on July 16, 1998, December 9, 1999, and on June 15, 2000. Mr. Cox specifically notes that the training session on June 15, 2000, included a "hands-on" portion in which each person was observed making a specimen joint. The letter makes no mention of such a hands-on portion for the training sessions held in 1998 or 1999. Similarly, page 66 contains a copy of a facsimile cover sheet dated November 28, 2000, from Mr. Larry Osborne, Miller Pipeline Corp., to Mr. Stafford. The cover sheet contains a note in which Mr. Osborne states that his personnel delivered sample kits and explained installation of low pressure kits to respondent in June, 2000, and provided a two-day training for Respondent on August 8, 1994. There is no mention of a hands-on portion for either session. Finally, the remaining 72 pages of the document contain attendance sheets for training sessions between 1996 and 1999, photos of persons holding training certificates, or written procedures provided by pipe manufacturers. Neither the existence of the training meetings nor the adequacy of the pipe manufacturer's written procedures is in dispute or relevant to show that specimen joints were done.

Although Respondent's supplemental documentation does not affirmatively prove that Respondent properly qualified its personnel to make plastic pipe joints, it is OPS that bears the burden of proving that Respondent did not. I find that there is not sufficient evidence to conclude that Respondent has failed to properly qualify its employees to make plastic pipe joints. Accordingly, I withdraw Item 1 of the Notice.

ASSESSMENT OF PENALTY

Under 49 U.S.C. § 60122, Respondent is subject to a civil penalty not to exceed $25,000 per violation for each day of the violation up to a maximum of $500,000 for any related series of violations.

49 U.S.C. § 60122 and 49 C.F.R. § 190.225 require that, in determining the amount of the civil penalty, I consider the following criteria: nature, circumstances, and gravity of the violation, degree of Respondent's culpability, history of Respondent's prior offenses, Respondent's ability to pay the penalty, good faith by Respondent in attempting to achieve compliance, the effect on Respondent's ability to continue in business, and such other matters as justice may require.

The Notice proposed a civil penalty of $5,000 for Item 2, violation of 49 C.F.R. § 192.725. Respondent argued that, although it committed a technical violation, it met the spirit of the regulation and that the leak tests it performed in lieu of pressure testing resulted in a greater margin of safety than would have been achieved through pressure testing alone. In this regard, generally, when an operator believes that it can achieve a better margin of safety by performing alternative activities in lieu of compliance with the regulations, it must apply for a waiver under 49 U.S.C. § 60118(c). In the present case, Respondent was not granted a waiver from pipeline safety regulations but, instead, took the initiative to perform its alternative activities without a waiver. Respondent also testified that it would have pressure tested the line if it had access to the building serviced by the line but that it was unable to do so because it was unable to gain access to the building at the time it was taking remedial actions. However, Respondent conceded that access was made available a few hours after the line had been returned to service and failed to articulate any reason why it did not wait to return the line to service until after it had gained access to the building. Accordingly, having reviewed the record and considered the assessment criteria, I find that the proposed penalty is proper. Therefore, pursuant to § 190.225 and 49 U.S.C. § 60122, I hereby assess Respondent a civil penalty in the amount of $5,000 for failure to properly pressure test a line that had been disconnected from service before the line was returned to service.

Payment of the civil penalty **must be made within 20 days of service**. Payment can be made by sending a certified check or money order (containing the CPF Number for this case) payable to "U.S. Department of Transportation" to the Federal Aviation Administration, Mike Monroney Aeronautical Center, Financial Operations Division (AMZ-320), P.O. Box 25770, Oklahoma City, OK 73125.

Federal regulations (49 C.F.R. § 89.21(b)(3)) also permit this **payment to be made by wire transfer**, through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. **Detailed instructions are contained in the enclosure**. After completing the wire transfer, send a copy of the **electronic funds transfer receipt** to the **Office of the Chief Counsel** (DCC-1), Research and Special Programs Administration, Room 8407, U.S. Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590-0001.

Questions concerning wire transfers should be directed to: Financial Operations Division (AMZ-320), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 25770, Oklahoma City, OK 73125; (405) 954-4719.

Failure to pay the $5,000 civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9 and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Furthermore, failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a United States District Court.

Under 49 C.F.R. § 190.215, Respondent has a right to petition for reconsideration of this Final Order. The petition must be received within 20 days of Respondent's receipt of this Final Order and must contain a brief statement of the issue(s). The filing of the petition automatically stays the payment of any civil penalty assessed. All other terms of the order, including any required corrective action, shall remain in full effect unless the Associate Administrator, upon request, grants a stay. The terms and conditions of this Final Order are effective upon receipt.

Stacey Gerard
Associate Administrator
for Pipeline Safety

MAY 16 2001
Date Issued